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DELL GLOBAL BUSINESS CENTER SDN BHD v. KETUA PENGARAH HASIL DALAM NEGERI

HIGH COURT MALAYA, PULAU PINANG
AMARJEET SINGH SERJIT SINGH JC
[JUDICIAL REVIEW NO: PA-25-17-03-2021]
19 AUGUST 2021

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CIVIL PROCEDURE: *Judicial review – Certiorari – Application for – Judicial review against additional tax assessments by Director General of Inland Revenue ('DGIR') – Whether DGIR committed 'very exceptional circumstances' in imposing additional tax assessments – Whether DGIR taken all relevant circumstances into account – Whether what DGIR did was authorised under statute – Whether power included making determination whether taxpayer brought himself within ambit of any exemption claimed – Whether taxpayer given right to be heard – Rules of Court 2012, O. 53 r. 3 – Income Tax Act 1967, s. 99*

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REVENUE LAW: *Income Tax – Additional assessments – Application to quash decision of Director General of Inland Revenue ('DGIR') – Whether DGIR taken all relevant circumstances into account – Whether what DGIR did was authorised under statute – Whether power included making determination whether taxpayer brought himself within ambit of any exemption claimed – Whether taxpayer given right to be heard – Rules of Court 2012, O. 53 r. 3 – Income Tax Act 1967, s. 99*

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This was an application by the applicant, Dell Global Business Center Sdn Bhd, pursuant to O. 53 r. 3 of the Rules of Court 2012 ('ROC'), for leave of court to commence judicial review proceedings against the Director General of Inland Revenue ('DGIR') for, *inter alia*: (i) an order of *certiorari* to quash additional assessments made by the latter against the former for the assessment years 2016, 2017, 2018 and 2019 ('impugned assessments') by virtue of the Income Tax Act 1967 ('ITA'); and (ii) various declarations to declare the impugned assessments null and void. The applicant, a part of the Dell Group, claimed to operate the Dell Global Strategic Impact Centre ('DGSIC') for the activities of manufacturing, high value services, supply chain management and procurement including sale and distribution ('activities'). Through an exchange of letters between the parties, the applicant sought to explain (i) the Dell Group's intention to consolidate all of its businesses, including the Dell Asia Pacific Sdn Bhd ('DAPSB') and Dell Sales Malaysia Sdn Bhd ('DSM') into one single entity, Dell Malaysia; and (ii) the tax exemption granted to the activities carried out by DGSIC by the Ministry of Finance ('MOF'). The applicant contended that, DAPSB was awarded a special incentive package with regard to its manufacturing activities which spelt out a ten-year period of tax exemption, which came with a condition of an average annual sale of RM12 billion. However, the DGIR, *via* an audit, found the special incentive package granted to the applicant did not extend to activities carried out by DSM. To this, another exchange of letters took place between the applicant, Malaysia Digital

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Economy Corporation ('MDEC') and Malaysia Investment Development Authority ('MIDA') resulting in MIDA and MDEC informing the applicant that the Government of Malaysia ('GOM') agreed to consolidate the special incentive package and remove the RM12 billion sales condition. The applicant also requested for the trading activities undertaken by DSM to be included in the special package so that DSM would also enjoy the tax exemption. It was later claimed that MIDA, through a letter, had agreed to grant tax exemption to businesses undertaken by DSM and to also amend the incentive package into: (i) first special incentive for manufacturing activities; and (ii) second special incentive for high value services and supply chain management and procurement activities which included sale distribution and delivery of finished product/services. After several exchanges of correspondences involving the applicant, MIDA and MOF, the businesses of DAPSB and DSM were consolidated into the applicant together with the special incentives and tax exemptions. But much to the applicant's dismay, the DGIR stated that the special incentives did not include the activities of DSM and, therefore, the applicant was not entitled to claim the tax exemptions for the years of assessment 2016 to 2018 pertaining to DSM's activities. After being supplied the relevant documents, the DGIR also decided that DSM was not entitled tax exemption for the assessment year 2019. Hence, the applicant reiterated its position to the DGIR, by giving reasons and making representations that the activities carried out by DSM were supposed to be included in the second special incentive and that it had already been recognised by GOM to be a special consolidated incentive. The DGIR maintained his position by stating that the applicant had not fulfilled the condition to achieve at least annual average sales of RM12 billion from 2003 to 2018 under the first special incentive. In reply, the applicant posited that the DGIR had committed error in deciding the special incentive and annual sales issues. Pursuant to an earlier letter from MDEC and MIDA, the annual sales condition had already been abrogated, and even if was indeed applicable, the applicant had fulfilled such condition, as its annual sales was RM14 billion. Despite this, the DGIR did not budge and issued the impugned notices of assessment. Besides commencing the present application, the applicant also filed an appeal to the Special Commissioners of Income Tax ('SCIT') pursuant to s. 99 of the ITA. In support of this application, the applicant contended that leave for judicial review sought should be granted as the DGIR had committed 'very exceptional circumstances' in arriving at its decision to impose the impugned assessments, among others: (i) the DGIR had unlawfully revoked the first and second special incentives ('incentives') which power lawfully lain with the authority that had approved them; (ii) the incentives were revoked without giving Dell Malaysia opportunity to consult with the relevant authorities that had the power to revoke them; (iii) the DGIR imposed the annual sales condition of RM12 billion although the same had been revoked by MDEC; and (iv) the DGIR raised the RM12 billion condition at the last minute without giving Dell Malaysia sufficient opportunity to respond to the

same and raised the impugned assessments without sufficiently considering the explanations of Dell Malaysia. Hence, the issue that arose was whether the applicant had successfully shown that 'very exceptional circumstances' had been committed by the DGIR in arriving at his decision to impose the impugned assessments, so as to bypass the requirement of exhausting the statutory appeal avenue under s. 99 of the ITA, so that leave for judicial review could be granted.

Held (dismissing application):

(1) A taxpayer is required to show that 'very exceptional circumstances' exist before leave to commence judicial review proceedings in view of the statutory appeal avenue provided under s. 99 of the ITA could be granted. The DGIR therefore, in arriving at his decision to impose the impugned assessments, must have done something of such an exceptional kind that the court would be prepared to exercise its review jurisdiction without the taxpayer having to resort to exhaust the statutory appeal avenue. In the case of *Government Of Malaysia & Anor v. Jagdis Singh*, what amounted to 'very exceptional circumstances' included: (i) a clear of lack of jurisdiction; (ii) a blatant failure to perform some statutory duty; or (iii) in appropriate cases, a serious breach of the principles of natural justice; had been committed by the DGIR in arriving at his decision to impose the impugned assessments. (paras 25 & 40)

(2) The applicant failed to satisfy the 'very exceptional circumstances' test. There was nothing on the face of the record that could imply the imposition of the impugned assessments was a result of the DGIR revoking the incentives. The record instead showed that the DGIR made the decision at the conclusion of the audit, after studying documents and representations that were produced and made in front of him. His finding that the tax exemption ought not to be entitled to the applicant was also made based on these documents. Thus, the allegation that the DGIR revoked the incentives was unfounded and mischievous. (para 46)

(3) The making of an additional assessment was an official administrative act of the DGIR who, after taking into account all relevant circumstances, determines the amount of tax to be paid by a taxpayer. Therefore, the DGIR was only doing what he was statutorily authorised to do under the ITA. The power of the DGIR would necessarily include making a determination of whether a taxpayer had brought itself within the ambit of any exemption claimed. There was therefore nothing exceptional about the DGIR making an assessment based on the construction of documents made available to him and on principles he believed to be right, although the taxpayer might not agree with it. (para 47)

(4) The applicant was given a reasonable right to be heard and sufficient time to explain its position. It was given a period of two weeks to answer its failure to comply with the RM12 billion annual average sales condition. A comprehensive answer had also been given on this issue by the applicant. As such, this complaint did not fall within 'very exceptional circumstances'. (para 48)

(5) Other than filing the current application, the applicant also filed an appeal to challenge the impugned assessments to the SCIT. This application, together with the current application, involved the same grounds. Therefore, it was an abuse of the process of the court and this should not be allowed. This was done so in the event the applicant failed by way of judicial review, it could still fall back on the statutory appeal; in other words, having a second bite of the cherry or litigating in instalments. It was also against public policy as the practise of resorting to both avenues would inevitably result in expensive duplication of the effort, time and money requiring two sets of procedures to be followed in respect of the same subject matter. A taxpayer must only decide on one mode to seek relief. Premised on this and above reasons, the leave was refused, hence, the application was dismissed. (paras 52-53 & 56)

Case(s) referred to:

Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals [2012] 1 CLJ 805 FC ***(refd)***

Berjaya Times Square Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri Malaysia [2019] 1 LNS 1078 HC ***(refd)***

Bintulu Lumber Development Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2017] 1 LNS 947 HC ***(refd)***

Central Coldstorage Kuching Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2011] 1 CLJ 353 HC ***(refd)***

Chin Mee Keong & Ors v. Pesuruhjaya Sukan [2007] 5 CLJ 363 CA ***(refd)***

Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia [2013] 2 CLJ 1009 FC ***(refd)***

Empayar Canggih Sdn Bhd v. Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri Dan Hal Ehwal Pengguna Malaysia & Anor [2013] 7 CLJ 681 CA ***(refd)***

Government Of Malaysia & Anor v. Jagdis Singh [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 SC ***(refd)***

Iskandar Coast Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2019] 7 CLJ 143 CA ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 2 CLJ 1 FC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Latex Manufacturing Sdn Bhd [2016] 9 CLJ 86 HC ***(dist)***

Ketua Pengarah Hasil Dalam Negeri v. Mudah.my Sdn Bhd [2017] 5 CLJ 283 CA ***(refd)***

Ketua Pengarah Hasil Dalam Negeri (LHDN) v. IBM (Malaysia) Sdn Bhd [2021] 1 CLJ 776 CA ***(refd)***

Ketua Pengarah Kastam Dan Eksais v. Coach Malaysia Sdn Bhd [2019] 4 CLJ 454 CA ***(refd)***
M & W Zander (M) Sdn Bhd v. Director General Of Inland Revenue [2005] 6 CLJ 336 HC ***(refd)***
Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***
Malaysia National Insurance Sdn Bhd v. Abdul Aziz Mohamed Daud [1978] 1 LNS 117 FC ***(refd)***
Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor [2014] 2 CLJ 525 FC ***(refd)***
Metacorp Development v. Ketua Pengarah Hasil Dalam Negeri [2011] 1 LNS 1002 HC ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
Pengurusan Danaharta Nasional Bhd v. Tang Kwor Ham & Ors And Another Appeal [2007] 4 CLJ 513 FC ***(refd)***
QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor [2006] 2 CLJ 532 CA ***(refd)***
Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors And Other Appeals [2021] 4 CLJ 1 FC ***(refd)***
Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor [2004] 6 CLJ 398 HC ***(refd)***
Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor [2008] 6 CLJ 235 CA ***(refd)***
Teng Chang Khim v. Badrul Hisham Abdullah & Anor [2017] 9 CLJ 630 FC ***(refd)***
Tuan Sarip Hamid & Anor v. Patco Malaysia Bhd [1995] 3 CLJ 627 SC ***(refd)***
WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***
Zakaria Abduallah & Ors v. Lembaga Perlesenan Tenaga Atom & Ors [2013] 1 LNS 304 CA ***(refd)***

Legislation referred to:
Income Tax Act 1967, ss. 99, 127(3A), Schedule 5 para. 34
Promotion of Investments Act 1986, s. 9
Rules of Court 2012, O. 53 rr. 2(4), 3(1), (5), O. 92 r. 4

Other source(s) referred to:
Professor Wade, 7th edn of Wade and Forsyth, *Judicial Review of Administrative Action*, p. 725

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JUDGMENT

Amarjeet Singh Serjit Singh JC:

Introduction

[1] This is an application under O. 53 r. 3 of the Rules of Court 2012 by the applicant, Dell Global Business Sdn Bhd for leave of court to commence judicial review proceedings against the Director General of Inland Revenue ("DGIR") primarily for the following reliefs:

(i) an order of *certiorari* to quash the additional assessment made against it for the years of assessment 2016, 2017, 2018 and 2019 ("the impugned assessments") made by the DGIR under the Income Tax Act 1967 ("ITA");

(ii) for various declarations to the effect that the impugned assessments are null and void; and

(iii) a stay of proceedings under O. 53 r. 3(5) of the Rules of Court 2012 until the disposal of the judicial review application or alternatively an order directing the DGIR to receive the amount assessed in 180 equal monthly instalments to be paid on or before the 28th of each month.

[2] Although the rule requires that the application for leave is to be made *ex parte*, I found it necessary to invite the DGIR to address me on the alternative remedy issue, namely, whether leave should be granted based on the material placed by the applicant before me. This course is allowed based on the often quoted case of *Tuan Sarip Hamid & Anor v. Patco Malaysia Bhd* [1995] 3 CLJ 627; [1995] 2 MLJ 442.

[3] On 8 June 2021, I refused leave and dismissed the application on the following two grounds:

(i) the applicant failed to show "very exceptional circumstances" to seek the remedy of judicial review to by-pass exhausting the statutory appeal avenue specifically provided under s. 99 of the ITA; and

(ii) the act of seeking judicial review against the DGIR's decision and at the same time appealing the DGIR's decision is an abuse of the process of the court.

The Background Facts

[4] The applicant was incorporated in 2006 and is part of the Dell Group. It claims to operate the Dell Global Strategic Impact Centre and the following activities: manufacturing, high value services, supply chain management and procurement which include sale and distribution. In November 2019 the DGIR carried out a tax audit on the applicant. Documents and information were sought from the applicant concerning the tax exemption under sub-s. 127(3A) of the ITA claims that the applicant had made for the years of assessment 2014 to 2018.

[5] There was an exchange of letters between the parties and the DGIR, in a letter dated 29 April 2020, had sought an explanation on the consolidation of the applicant with Dell Asia Pacific Sdn Bhd ("DAPSB") and Dell Sales Malaysia Sdn Bhd ("DSM") and the Ministry of Finance letter dated 13 October 2016 on the tax exemption concerning the Dell Global Strategic Impact Centre activities. The applicant explained that in 2004, DAPSB was awarded a special incentive package with regard to its manufacturing activities which included a ten-year period of tax exemption

which came with a condition for an average annual sale of RM12 billion. In 2009, DSM was incorporated for the purpose of undertaking the sales and distribution (trading) activities. It was said that Dell Group intended to consolidate its business activities and lines into a single entity ie, Dell Malaysia and to launch the Dell Global Strategic Impact Centre.

[6] The DGIR, based on the audit, found that the special incentive package the applicant was entitled to do not include the activities carried out by DSM and sought further feedback from the applicant. The applicant explained *vide* letter dated 19 June 2020 that meetings had been held and letters exchanged between the Malaysia Digital Economy Corporation ("MDEC") and Malaysia Investment Development Authority ("MIDA") on Dell Group's intention to consolidate all its business activities under one entity ie Dell Global Business Center Sdn Bhd ("the applicant"). It was claimed that, MIDA in a letter dated 18 August 2010 informed the applicant that the Government of Malaysia ("GOM") had decided to consolidate the special incentive packages and remove the RM12 billion sales condition.

[7] Subsequently, Dell Malaysia in a letter dated 7 September 2010 to MIDA made a request that the trading activities be included in the special incentive package so that the activities undertaken by DSM would enjoy the tax exemption under sub-s. 127(3A) of the ITA. It was claimed that through MIDA's letter dated 20 January 2012 the incentive packages were amended to: (i) first special incentive for manufacturing activities; (ii) second special incentive for high value services and supply chain management and procurement activities which include sale distribution and delivery of finished product/services. The applicant read the letter as granting tax exemption for the trading activities (sale and distribution activities) which were activities previously undertaken by DSM.

[8] The applicant claimed that in a letter dated 17 April 2014, MIDA conveyed that if Dell Malaysia was desirous of relaunching the Dell Global Strategic Impact Centre then the first special incentive and the second special incentive would be reinstated. On 26 November 2014, Dell Malaysia accepted the terms to relaunch the Dell Global Strategic Impact Centre. On 1 February 2015 it was said that the businesses of DAPSB and DSM were consolidated into Dell Malaysia. It was explained that letters dated 31 October 2016 and 21 October 2016 from the Ministry of Finance ("MOF") and MIDA respectively conveyed the consolidation of the said special incentive packages for Dell Malaysia to undertake the Dell Global Strategic Impact Centre activities. It was further explained that all the business activities of the applicant, DAPSB and DSM were to be carried out by the applicant and that all the special incentives and tax exemptions of both the said companies were also consolidated under the applicant.

[9] The applicant explained that subsequently MDEC, in a letter dated 31 March 2017, informed that the said letter with the annexures attached constitutes the entire understanding pertaining the subject matter and supersedes all prior and contemporaneous representations, negotiations and understandings be it oral or written. The letter also stated, for the avoidance of doubt, that the customised incentives that have been fully utilised by the company prior to the commencement date in compliance with the then applicable conditions would remain.

[10] The DGIR in a letter dated 10 December 2020 stated that the special incentives did not include the activities of DSM and as a result thereof the applicant was not entitled to claim the exemptions as it had done for the years of assessment 2016 to 2018. The DGIR then in an e-mail dated 14 January 2021 requested to be supplied with certain documents for the year of assessment 2019 which request the applicant fulfilled the same day. This event was followed by the DGIR's letter dated 18 January 2021 whereby it was stated that the applicant was also not entitled to the tax exemption for the year of assessment 2019.

[11] The applicant in a letter dated 2 February 2021 reiterated its position giving its reasons and making representations as to why it was entitled to the special incentive. It was stressed that the activities carried out by DSM were included in the second special incentive and therefore the DGIR was wrong in disregarding the incentive in respect of sale and distribution/trading activities which the GOM was already informed of and had recognised as the special consolidated incentive. In a letter dated 10 February 2021, the DGIR maintained his position and also stated that the applicant did not fulfil the condition that the company must achieve annual average sales of at least RM12,000 million from 2003 to 2018 under the first special incentive.

[12] In a letter dated 24 February 2021 the applicant reiterated its position with reasons and set out the errors committed by the DGIR in respect of both the special incentive issue and the average annual sales issue. The applicant gave a detailed explanation on both issues. Briefly, on the average annual sales issue the applicant stated that the condition was no longer in force based on a letter by MDEC dated 31 March 2017 and secondly that even if the condition was in force the applicant had achieved average sales of RM14,000 million and therefore fulfilled the condition.

[13] In a letter dated 26 February 2021 the DGIR maintained his position and issued the impugned notices of assessment to the applicant. The applicant, on 17 March 2021, responded by filing an appeal to the Special Commissioners of Income Tax ("Special Commissioners") under s. 99 of the ITA.

[14] The appeal was followed with the filing of the instant application for leave to commence judicial review on the next day.

A **Principles Concerning Leave Under Order 53**

[15] It is trite that there are two stages in judicial review proceedings in the scheme of O. 53 of the Rules of Court 2012. The threshold or leave stage and the substantive or *inter partes* stage. The leave stage, is designed to act as a filter so that only proper cases proceed to the substantive stage to be fully investigated and determined with all such evidence as is necessary on the facts and all such arguments as is necessary on the law.

Whether Satisfying The Adversely Affected Test Is Sufficient To Grant Leave?

[16] The applicant submitted that: It is crystal clear that the applicant has satisfied the "adversely affected" test ... and should be granted leave. This is not the law. Order 53 r. 2(4) of the Rules of Court 2012 provides that any person who is adversely affected by the decision of any public authority shall be entitled to make the application. The rule provides that a person who satisfies the "adversely affected" test has the *locus standi* to make an application for judicial review. The test is satisfied if the party making the application can show "a real and genuine interest in the subject matter of review" (see *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor* [2014] 2 CLJ 525; [2014] 3 MLJ 145). The leave stage, which is set out in O. 53 r. 3(1) of the Rules of Court 2012, necessitates the obtaining of leave, as the rule provides that no application can be made unless leave has been granted in accordance with this rule. The granting of leave is therefore not a mere formality and is only granted based on established principles.

[17] The authority on point is the Federal Court decision of *Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals* [2012] 1 CLJ 805; [2011] 6 MLJ 490 ("*Members Of The Commission Of Enquiry*") where it was said:

> It is clear from the above that a person who is adversely affected by the decision of a public authority can make an application for a judicial review of that decision. But the person must first obtain leave before his substantive motion can be heard.

[18] The submission is therefore devoid of merit.

The Established Principles For Granting Leave

[19] This brings me to the established principles for a reviewing judge to decide whether leave ought to be granted or not. The principles are authoritatively settled and set out in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478; [2012] 4 MLJ 296 ("*WRP Asia Pacific Sdn Bhd*") in the following words:

> At the leave stage, on a quick perusal of the material available, if the court thinks that subsequently at the substantive hearing stage an arguable case may be disclosed, and the relief sought may be granted, leave should be granted ...Without the need to go into depth of the abundant authorities, suffice if we state that leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though ie, unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged.

[20] So, leave will be granted if an applicant demonstrates an arguable case, that is to say, from the perusal of the material made available to the court there is some substance for further investigation in favour of granting the reliefs sought at the substantive stage. This threshold is very low and leave will be refused only if absolutely no success may be envisaged. Otherwise, leave will be refused if the application is not thought of as frivolous or where notwithstanding an arguable case is made out is one that is not amenable to judicial review.

[21] There are certain instances where a matter may or may not be amenable to judicial review as determined by case law through the years. One such instance is where the statute under which a decision is made by a public body or authority specifically provides an avenue to appeal the decision to a specialised body established by the said statute – known as the alternative remedy issue and which issue arises for determination in the instant application. Other notable instances are, *inter alia*: matters that are non-justiciable (see *Teng Chang Khim v. Badrul Hisham Abdullah & Anor* [2017] 9 CLJ 630; [2017] 5 MLRA 651); matters excluded from judicial review by statute (see *Pengurusan Danaharta Nasional Bhd v. Tang Kwor Ham & Ors And Another Appeal* [2007] 4 CLJ 513; [2007] 1 MLRA 648; and *Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors And Other Appeals* [2021] 4 CLJ 1; [2021] 3 MLRA 260); matters concerning policy and/or management prerogative (see *Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia* [2013] 2 CLJ 1009; [2013] 2 MLRA 179); the exercise of powers in the course of criminal investigations (see *Empayar Canggih Sdn Bhd v. Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri Dan Hal Ehwal Pengguna Malaysia & Anor* [2013] 7 CLJ 681; [2015] 1 MLRA 341); and matters against public policy (*Members Of The Commission Of Enquiry*).

[22] Back to the alternative remedy issue. Generally, the courts are reluctant to allow leave to commence judicial review to challenge a decision of a public body or authority when the statute under which the decision was made explicitly established a specialised body to determine appeals against such decisions. But the courts have established an exception where a person adversely affected with the decision would be allowed to pursue the remedy of judicial review without exhausting the said alternative remedy.

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The Principles Governing The Alternative Remedy Issue

[23] The principles governing the alternative remedy issue is well-settled and are as enunciated by the Supreme Court in *Government Of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110; [1987] 2 MLJ 185 ("*Jagdis Singh*"), which is incidentally a tax case.

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[24] The *ratio decidendi* of the Supreme Court is stated in the following paragraphs of the judgment:

> ... it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. Judicial review is always at the discretion of the Court *but where there are other avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances*.
>
> ... we would therefore hold that the discretion is still with the Courts but where there is an appeal provision available to the applicant *certiorari should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice*. (emphasis added)

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[25] In *Jagdis Singh* the criteria that may amount to exceptional circumstances were described as follows:

(i) a clear lack of jurisdiction;

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(ii) a blatant failure to perform some statutory duty; or

(iii) in appropriate cases a serious breach of the principles of natural justice.

[26] The use of the adjectives; clear, blatant and serious refer to something exceptional from the standard description of grounds the High Court is prepared to exercise its supervisory power.

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[27] The Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1 ("*Majlis Perbandaran Pulau Pinang*") was the next apex court case that dealt with the question of alternative remedy. In view of the opposing submissions made in respect of the case it behoves to state the *ratio decidendi* for which the case is authority. There the Federal Court began, as a starting point, the conflict of judicial opinion in the United Kingdom on the issue of alternative remedy and in the course of its narrative agreed with Professor Wade's opinion at p. 725, 7th edn of Wade and Forsyth, *Judicial Review of Administrative Action* that in the face of statutory appeal avenue, when genuine grounds for judicial review are alleged, it is the refusal rather than the grant of relief which is the exceptional course.

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[28] The Federal Court then proceeded to cite an anthology of cases where judicial review was granted notwithstanding the existence of an alternative remedy. It was in this context that the Federal Court made the following

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statement: why should not illegality, that is to say, unlawful treatment not nipped in the bud by the quicker and adequate remedy of judicial review rather than appeal.

[29] I would at this stage interpolate to point out that the applicant relied on this part of the judgment by reproducing the paragraphs therein to support its argument that when genuine grounds for judicial review are alleged the exceptional course is to refuse leave.

[30] But, the *ratio decidendi* on the alternative remedy issue in *Majlis Perbandaran Pulau Pinang* is not contained in the paragraphs highlighted and relied by the applicant but contained in the paragraph that come thereafter which for its proper impact is reproduced below:

> Having said that we recognise that there are certain classes of cases such as planning, employment cases and tax cases ..., where a statute provides for a specialised appeal procedure, and so the courts understandably may not grant judicial review but this is always subject, to the grant of review in certain cases for example, where an applicant is able to demonstrate excess or abuse of power, or breach of the rules of natural justice.

[31] In this regard I can do no better than to quote Anantham Kasinather JCA when His Lordship commented on the above paragraph in *Zakaria Abduallah & Ors v. Lembaga Perlesenan Tenaga Atom & Ors* [2013] 1 LNS 304; [2013] 6 MLRA 522 ("*Zakaria Abduallah*") as follows:

> ... then acknowledged cases of a technical nature involving planning, employment and tax to fall within the category of cases where the Court could justifiably refuse, where a statute provides for a specialized appeal procedure. In other words, in cases of a technical nature such as this, *the rule would operate in reverse and the Court should grant leave for judicial review only in exceptional cases. The exception being where the applicant is able to demonstrate abuse of power or breach of the rules of natural justice*.
>
> (emphasis added)

[32] The principle in *Jadgis Singh* has been consistently applied till today. The decisions in the following reported Court of Appeal cases attest to this: *Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor* [2008] 6 CLJ 235; [2009] 1 MLJ 555; *Ketua Pengarah Hasil Dalam Negeri v. Mudah.my Sdn Bhd* [2017] 5 CLJ 283; [2017] 2 MLJ 197 ("*Mudah.my Sdn Bhd*"); *Iskandar Coast Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2019] 7 CLJ 143; [2019] 4 AMR 317; *Bintulu Lumber Development Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2017] 1 LNS 947; *Ketua Pengarah Kastam Dan Eksais v. Coach Malaysia Sdn Bhd* [2019] 4 CLJ 454; and *Ketua Pengarah Hasil Dalam Negeri (LHDN) v. IBM (Malaysia) Sdn Bhd* [2021] 1 CLJ 776.

[33] In *Mudah.my Sdn Bhd* it was authoritatively held that *Jagdis Singh* is binding on the Court of Appeal in the following words:

> [22] ... The decision in *Jagdis Singh* thus laid down a lucid and authoritative guiding principles enunciated by none other than the highest court of the land which this court was bound to follow. Therefore, the principle remains a good law here that the way is open for this court to hold that the above case authorities should apply to the appeal before us especially when these authorities deal specifically in revenue matters where an alternative and specific remedy is expressly provided under s. 109H of Act 53. It is beyond question that this position is not an option but the law that ought to be complied with and applied to the instant application.

[34] The cases relied by the applicant where leave has been granted in tax cases: *Chin Mee Keong & Ors v. Pesuruhjaya Sukan* [2007] 5 CLJ 363 ("*Chin Mee Keong*"); *Ketua Pengarah Hasil Dalam Negeri v. Latex Manufacturing Sdn Bhd* [2016] 9 CLJ 86 ("*Latex Manufacturing Sdn Bhd*"); and *Metacorp Development v. Ketua Pengarah Hasil Dalam Negeri* [2011] 1 LNS 1002; [2011] 5 MLJ 447 are nothing more than the straightforward application of the *Jadgis Singh* principle.

At What Stage Can The Issue Of Alternative Remedy Be Raised?

[35] The applicant submitted that the issue of the availability of an alternative remedy is not to be decided at the leave stage but at the substantive stage of the judicial review proceedings. The Court of Appeal's decisions in *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532 ("*QSR Brands Bhd*") and *Chin Mee Keong* and the cases that followed these two cases were cited as authorities for the proposition. On the other hand, the putative respondent contended that there are many cases that decided the issue at the threshold stage. The cases mentioned in para. [32] above supports this contention.

[36] I had no hesitation in holding that the alternative remedy issue can be addressed at the threshold stage of the proceedings. The authority for this proposition and which decision is binding on me is *Majlis Perbandaran Pulau Pinang*. There the question regarding the stage the alternative remedy issue is to be raised was specifically dealt with and answered as follows:

> Before considering this question, **we would like to make a preliminary observation regarding the stage at which the question of alternative remedy should be dealt with**. There is no hard and fast rule about this. As we have said, the case of *R. v. Secretary of State for the Home Department ex p., Swati* (*ibid*) shows that **the existence of alternative remedies would be a ground for refusing leave to apply for judicial review**. It is also a ground for setting aside a grant of leave given earlier. (*R. v. Secretary of State for the Home Department ex p. Davendranath Doorga* [1990] COD 109). Again, the alternative remedies argument may be considered at the *inter partes* stage, even if leave had been granted and not challenged

(*R. v. Brentford General Commissioners, ex p. Chan* [1986] STC 65. At the final hearing stage, the court can consider the alternative remedies objection as a preliminary point (*R. v. Chief Adjudicating Officer, ex p. Bland*, The Times 6 February 1985) or at a later stage. (emphasis added)

[37] In view of the decision in *Majlis Perbandaran Pulau Pinang*, which is of general application, the legal position in tax cases is as follows: the existence of the statutory appeal avenue provided in s. 99 of the ITA may be a ground for refusing leave to apply for judicial review. The earliest moment to raise the issue is at the leave stage. I am further supported by the position taken by the Court of Appeal in *Zakaria Abduallah* on this point, where it was said:

[15] ... The first is learned counsel's submission that there is a distinction to be drawn between the leave stage and the substantive stage in determining the impact of an alternative remedy on an application for judicial review ... The case of *QSR Brands Bhd* ... was cited in support of this proposition. With respect, we are unable to agree with this submission as the Federal Court in *Majlis Perbandaran Pulau Pinang* ... acknowledged that "*there is no hard and fast rule*" concerning the stage at which the question of alternative remedy should be dealt with after citing the case of *R v. Secretary of State for the Home Department; ex p Swati* [1986] 1 All ER 717 as authority for this proposition.

[16] Secondly, admittedly the Federal Court ... then acknowledged cases of a technical nature involving planning, employment and tax to fall within the category of cases where the court could justifiably refuse, where a statute provides for a specialised appeal procedure. In other words, in cases of a technical nature such as this, **the rule would operate in reverse and the court should grant leave for judicial review only in exceptional cases**. (emphasis added)

[38] In this regard it is pertinent to note that on a close reading of the three judgments in *Chin Mee Keong* the majority did not agree with *QSR Brands Bhd* and therefore the case is against the applicant. In *Chin Mee Keong*, James Foong JCA and Low Hop Bing JCA, did not agree with the position in *QSR Brands Bhd*. The following statements by James Foong JCA (paras. [30] and [31]) and Low Hop Bing JCA (para. [71]) in *Chin Mee Keong* is evidence of this state of affairs:

[30] I am aware that this court in *QSR Brands Bhd* ... has gone as far as to declare ... that it is only at the hearing of the substantive motion for judicial review that the existence of an alternative remedy becomes relevant.

[31] But I am not inclined to accept such a wide proposition in the light of the authorities disclosed ... To summarily assign this issue of an alternative remedy to a subsequent stage for consideration after leave has been granted would, in my view, mean that even cases which are bound to fail *in limine* on the issue of availability of an alternative remedy would automatically be permitted at leave stage. It must be reminded that there

A are only limited exceptions to the general rule that judicial review is not available where there is an alternative remedy by way of appeal. And to ignore this at leave stage and allow all cases of such nature to proceed to the second stage after leave is granted would go beyond established principles particularly that of *Mohamed Nordin bin Johan v. Attorney General, Malaysia* (*supra*) which is a Federal Court case and the Supreme Court B decision in *J.P. Berthelsen v. Director-General of Immigration, Malaysia & Ors* [1986] 2 CLJ 409; [1986] CLJ (Rep) 160 which repeatedly states that the test is whether the application for leave is frivolous to merit the refusal of leave *in limine* ...

[77] In the light of the Federal Court judgment, I am of the view that *the* C *High Court is at liberty and indeed duty bound to consider any point raised, including the alternative remedy point, at the first stage of leave application* under O. 53 r. 3(1). The consideration of whether leave should be granted or refused *in limine* involves an exercise of discretion. *That discretion must be exercised according to established judicial principles, having regard to all the facts and circumstances of each particular case*. (emphasis added)

D

[39] In accordance with the doctrine of *stare decisis*, ie, where there are two conflicting decisions of the Court of Appeal the High Court is free to choose which decision to follow. In this case I respectfully choose to follow the reasoning in *Zakaria Abduallah* and *Chin Mee Keong* apart from being clearly bound by the decision in *Majlis Perbandaran Pulau Pinang*.

E

Applying The Law To The Facts: The Alternative Remedy Issue

[40] The law is clear. A taxpayer is required to show that "very exceptional circumstances" exist before this court can grant leave to commence judicial review proceedings in view of the statutory appeal avenue F provided by s. 99 of the ITA. The DGIR in arriving at the decision to impose the impugned assessments must have done something of such an exceptional kind that the court is prepared to exercise its review jurisdiction without the taxpayer having to resort to or exhaust the said statutory appeal avenue. What would amount to "very exceptional circumstances" would depend on G the facts and circumstances that are put forward by the applicant in its application.

[41] The applicant in its written submissions submitted that it is "immediately apparent from the face of the record that" of the following which it submits to be "very exceptional circumstances":

H

(i) The DGIR unlawfully revoked the first special incentive and the second special incentive ("the said incentives") which power lawfully lies with the authority that had approved the said incentives.

(ii) The said incentives were revoked without giving Dell Malaysia an I opportunity to consult with the relevant authorities, namely, the GOM and MOF through MIDA and MDEC which are the authorities having the power to revoke the said incentives.

(iii) The DGIR purported to impose the RM12 billion condition although the same was removed *vide* MDEC's letter dated 31 March 2017;

(iv) The DGIR raised the RM12 billion condition at the last minute without giving Dell Malaysia sufficient opportunity to respond to the same and raised the impugned assessments without sufficiently considering the explanations of Dell Malaysia;

(v) The DGIR disregarded the fact that the sales and distribution/trading activities of Dell Malaysia were covered under the second special incentive under the heading "supply chain management and procurement activities";

(vi) The DGIR disproportionately and illegally imposed taxes and penalties on all income received from Dell Malaysia in regard to its "high value services activities" and "supply chain management and procurement activities" and not just income from the sales and distribution/trading activities; and

(vii) The DGIR's conduct could have untold implications on the operations and investment of Dell Malaysia in Malaysia and more significantly, Penang.

The DGIR's Decision

[42] What the DGIR did in arriving at his decision is reflected in two of his letters to the applicant. The contents of the first letter dated 10 February 2021 in its original language reads as follows:

> Perbincangan maya dengan pihak puan bertarikh 23.10.2020, 11.12.2020 and 20.1.2021 dan email dari agen cukai puan bertarikh 19.1.2021 serta surat kami bertarikh 18.1.2021 adalah dirujuk.
>
> 2. Berdasarkan kepada beberapa siri perbincangan maya dan semakan dokumen-dokumen yang dikemukakan, pihak kami ingin memaklumkan perkara berikut:
>
> (i) Pihak kami mendapati, pihak tuan telah merangkumkan Dell Sales Malaysia Sdn. Bhd. (DSMSB) sebagai salah satu syarikat dalam gabungan tersebut untuk menikmati insentif cukai di bawah seksyen 127(3A) Akta Cukai Pendapatan 1967. **Seperti pihak tuan sedia maklum, DSMSB ini merupakan entiti yang tidak diluluskan dalam gabungan tersebut**. (first issue)
>
> (ii) Memandangkan pihak tuan tidak patuh syarat kelulusan yang telah diberikan kepada syarikat tuan ini, pendapatan pengecualian cukai bagi Perniagaan 1 (rujuk pengiraan cukai) perlu dilaraskan semula dalam pengiraan pendapatan syarikat tuan bagi tahun-tahun berkenaan. **Pelarasan semula dilakukan berikutan entiti yang tidak dapat kelulusan telah dimasukkan oleh pihak tuan dalam pakej berkenaan untuk serta menikmati insentif cukai berkenaa**n.

(iii) Bagi Perniagaan 2, pihak kami dapati pihak tuan tidak mematuhi syarat Lampiran 1(A)(ii)(a) iaitu syarikat hendaklah mencapai jumlah purata jualan tahunan sekurang-kurangnya RM12,000 juta mulai tahun 2003 hingga 2018. Semakan kami mendapati, purata jualan syarikat untuk tempoh tersebut adalah sekitar RM2,067 juta setahun. (second issue)

(iv) Berdasarkan kepada perkara ini, pihak kami mendapati, pihak tuan tidak mematuhi syarat dan pelarasan yang sewajarnya akan dibuat bagi pendapatan Perniagaan 2.

(v) Pelarasan pendapatan disertakan seperti dalam Lampiran 1 untuk rujukan dan tindakan pihak tuan.

4. Sila ambil maklum pihak kami memberikan 14 hari untuk pihak puan mengemukakan maklum balas berhubung perkara ini. Selepas dari tarikh tersebut, pihak kami akan bangkitkan notis taksiran tambahan tanpa sebarang makluman lagi. (emphasis added)

[43] On 24 February 2021 the applicant responded to the above letter. It referred to its earlier letters dated 2 February 2021 and 5 February 2021 providing responses to the first issue and gave a detailed feedback and its reasons disagreeing with DGIR's position. It also gave its explanation disagreeing with the second issue.

[44] In a letter dated 26 February 2021 the DGIR maintained his position and informed that additional assessments and penalty would be imposed on the applicant. The notices of assessment were enclosed with this letter. The contents of this letter in its original language read as follows:

Surat tuan bertarikh 2.2.2021, 5.2.2021, 24.2.2021 dan pertemuan dengan wakil cukai tuan Ernest & Young berhubung perkara di atas adalah dirujuk.

2. Setelah semakan dibuat oleh pihak kami terhadap semua maklumat yang dikemukakan oleh pihak tuan, pihak kami ingin memaklumkan perkara berikut:

(i) Isu percukaian melibatkan Perniagaan 1 adalah dikekalkan. *Pihak kami mendapati, pihak tuan telah memasukkan Dell Sales Malaysia Sdn. Bhd. (DSMSB) sebagai salah satu syarikat dalam gabungan tersebut untuk menikmati insentif cukai di bawah seksyen 127(3A) Akta Cukai Pendapatan 1967*. Seperti pihak tuan sedia maklum, DSMSB ini merupakan entiti yang tidak diluluskan dalam gabungan tersebut. *Memandangkan pihak tuan tidak patuh syarat kelulusan yang telah diberikan kepada syarikat tuan ini*, adalah diputuskan bahawa pendapatan pengecualian cukai bagi Perniagaan 1 (Rujuk Lampiran Pengiraan Cukai) perlu dilaraskan semula dalam pengiraan pendapatan syarikat tuan bagi tahun-tahun berkenaan.

(ii) Bagi Perniagaan 2, setelah semakan surat dari MIDA bertarikh 18/8/2010, 17/4/2014, 21/10/2016 serta surat kelulusan di bawah Seksyen 127(3A) Akta Cukai Pendapatan 1967 dari Kementerian Kewangan bertarikh 13/10/2016, pihak LHDNM mendapati tuan

tidak mematuhi syarat Lampiran 1(A)(ii)(a) iaitu syarikat hendaklah mencapai jumlah purata jualan tahunan sekurang-kurangnya RM12,000 juta mulai tahun 2003 hingga 2018. Semakan kami mendapati, purata jualan syarikat untuk tempoh tersebut adalah sekitar RM2,067 juta setahun.

3. Sehubungan itu pihak kami mengambil keputusan untuk bangkitkan Taksiran Tambahan dengan penalty Subseksyen 113(2) sebanyak 60%. Sebarang rayuan boleh dikemukakan kepada pihak kami berdasarkan kepada Seksyen 99 Akta Cukai Pendapatan 1967.

4. Sila tuan mematuhi arahan pembayaran Notis Taksiran dalam tempoh 30 hari dari tarikh Notis Taksiran Tambahan tersebut bagi mengelakkan kenaikan cukai 10% ke atas baki cukai yang belum dibayar.

5. Bersama-sama ini dikemukakan perkara berikut:

(i) Notis Taksiran Tambahan bagi tahun taksiran 2016 hingga tahun taksiran 2019.

(ii) Jadual Peninggalan Pendapatan bagi tahun taksiran 2016 hingga tahun taksiran 2019.

(iii) Pengiraan cukai bagi tahun taksiran 2016 hingga tahun taksiran 2019.

6. Kerjasama pihak puan berhubung perkara ini amat dihargai dan sekiranya pihak puan memerlukan penjelasan lanjut, sila pihak puan hubungi pihak kami dengan kadar segera. (emphasis added)

Decision Of The Court

[45] In my considered opinion the applicant has obviously failed to satisfy the "very exceptional circumstances" test. My reasons are as follows.

[46] There is nothing on the face of the record, especially the above-produced DGIR's letters, that in any way whatsoever implies that the imposition of the impugned assessments was as a result of the DGIR revoking the special incentive packages. The record instead shows that the DGIR made the decision at the conclusion of the audit, after studying the documents that were produced to him and the representations made on behalf of the applicant to him. The finding that the applicant was not entitled to the tax exemption was made based on the documents that were produced during the audit. The applicant from its responses clearly showed that it disagreed with the DGIR's construction of the letters and even went to the extent of showing where the DGIR was wrong. Thus, the allegation that the DGIR revoked the special incentives is an unfounded and mischievous allegation.

[47] It is pertinent to appreciate that the making of an additional assessment is an official administrative act of the DGIR who determines the amount of tax to be paid by a taxpayer after having taken into account all relevant circumstances before him (see *Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 2 CLJ 1; [2017] 1 MLJ 563). In the

case before me, the DGIR was doing what he is statutorily authorised to do under the ITA. The power of the DGIR would necessarily include making a determination of whether a taxpayer had brought itself within the ambit of any exemption that has been claimed. The question whether a taxpayer is eligible for some approved tax relief falls squarely within the province of the DGIR to determine. There is therefore nothing exceptional about the DGIR making an assessment based on the construction of documents made available to him by the taxpayer and on principles which he believes is right and which the taxpayer does not agree with. Such disagreement is only to be expected because the taxpayer will invariably not agree with the basis upon which the additional assessment is made. In such circumstances the proper remedy is for the taxpayer to go before the Special Commissioners for redress which would include the calling of evidence. (See *M & W Zander (M) Sdn Bhd v. Director General Of Inland Revenue* [2005] 6 CLJ 336; and *Central Coldstorage Kuching Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2011] 1 CLJ 353).

[48] The facts also show that the applicant was given a reasonable right to be heard and with sufficient time to explain its position. The applicant was given two weeks to answer the failure to comply with the RM12 billion annual average sales condition. A comprehensive answer was given on this issue by the applicant. In the circumstances, this complaint does not fall within "very exceptional circumstances".

[49] The applicant's argument that the DGIR blatantly ignoring the decision in *Latex Manufacturing Sdn Bhd* which was binding on him. A short answer to this is that the case is not binding on the DGIR because the facts of the instant case are different. The law is trite – a precedent is to be followed for its strict *ratio decidendi* (per Raja Azlan Shah FJ (as his Majesty then was) in the Federal Court case of *Malaysia National Insurance Sdn Bhd v. Abdul Aziz Mohamed Daud* [1978] 1 LNS 117; [1979] 2 MLJ 29). It suffices refer to the Federal Court decision in *Parlan Dadeh v. PP* [2009] 1 CLJ 717 where the following statement in *Precedent In English Law*, 4th edn by Cross and Harris at p. 63 was adopted to explain the what is "*ratio decidendi*":

> According to Dr Goodhart the *ratio decidendi* of a case is determined by ascertaining the facts treated as material by the judge. It is the principle to be derived from the judge's decision on the basis of those facts. Any Court bound by the case must come to a similar conclusion unless there is a further fact in the case before it which it is prepared to treat as material, or unless some fact treated as material in the previous case is absent.

[50] The case of *Latex Manufacturing Sdn Bhd* is distinguishable on the facts and does not bind the DGIR. There the DGIR had decided that the holder of a pioneer status certificate issued by the Minister of International Trade and Investment ("the Minister") under the Promotion of Investments Act 1986 ("PIA") had breached a condition therein and proceeded to impose the

additional assessments. The taxpayer appealed to the Special Commissioners who, after hearing the evidence given by witnesses before them, held that the said condition was not breached and reversed the DGIR. The DGIR appealed to the High Court against the decision of the Special Commissioners by way of a case-stated pursuant to para. 34 of Schedule 5 of the ITA. The High Court upheld the Special Commissioners and went on to hold, *inter alia*, that any additional assessments can only be issued by the DGIR after the Minister who had issued the pioneer status certificate had revoked the same under s. 9 of the PIA. Following this, the High Court held that since the pioneer status certificate was not revoked by the Minister the subsequent imposition of the additional assessments by the DGIR were unlawful. The decision of the High Court is reflected in the following passage:

> [20] Once a holder of a pioneer certificate has been found to be in breach of the conditions in the pioneer certificate, MITI, as the agency involved in granting the tax exemption, has a legal duty under s. 9 of the PIA to issue a show cause to the holder of the pioneer certificate as to why the pioneer certificate ought not to be cancelled and/or the tax incentive revoked. This is a condition precedent before any action is taken to impose additional assessment.

[51] The facts of the instant case are totally different and there no question of breaching a condition of a certificate similar to that issued under the PIA or a provision that is similar to s. 9 of the PIA which were the underpinning factors for the decision. Most notably the DGIR in the instant case did not revoke any tax incentive and the issue of revocation without jurisdiction does not arise. The submission is therefore devoid of merit.

Abuse Of The Process Of The Court

[52] In my view the filing of the instant application for judicial review is an abuse of the process of the court in view of the fact that the applicant had also filed an appeal to the Special Commissioners to challenge the impugned assessments. The two applications concern challenging the same assessments which involves the same grounds. Therefore taking up both avenues is an abuse of the process of the court and the court ought not to allow such practise. It has become fashionable to utilise judicial review and the appeal avenue at the same time. This is done so that in the event the applicant fails by way of judicial review it can still fall back on the statutory appeal. In other words, having a second bite of the cherry or litigating in instalments.

[53] It is also against public policy as the practise of resorting to both avenues will inevitably result in expensive duplication of the effort, time and money which requires two sets of procedures to be followed in relation to the same underlying subject matter. A taxpayer must therefore decide on one mode to seek relief.

[54] In *Berjaya Times Square Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri Malaysia* [2019] 1 LNS 1078; [2019] AMTC 218 this practise was denounced as follows:

> [35] Added to that, since the applicant has filed an appeal to the SCIT (Special Commissioners) under s. 99 of the ITA 1967, it is an abuse of the court process to maintain this application.

[55] Similarly, the High Court in *Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor* [2004] 6 CLJ 398; [2004] 6 MLJ 53 at p. 405 (CLJ); p. 61 (MLJ) said:

> [30] Further, I am also of the view that the concurrent filing of the instant application and applicant's appeal before the Special Commissioners certainly constitutes a duplicity of proceedings and is indeed frivolous, vexatious and an abuse of the process of the court.

Conclusion

[56] Premised on the above reasons leave is refused and the application is dismissed. In view of the dismissal there is nothing left before this court. There is no cause or matter in existence if leave is not granted. It is for this reason that encl. 9, which is an application under O. 92 r. 4 of the Rules of Court 2012 for a protection and sealing order would fall and not arise for consideration. And I so order.